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IN THE

Supreme Court of the United States

October Term, 1952.
No. 495

CALIFORNIA ELECTRIC POWER COMPANY, a corporation,
Petitioner,

vs.

FEDERAL POWER COMMISSION, COUNTY OF MINERAL, STATE OF NEVADA and UNITED STATES OF AMERICA,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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CALIFORNIA ELECTRIC POWER COMPANY, a corporation,

Petitioner,

vs.

FEDERAL POWER COMMISSION, COUNTY OF MINERAL, STATE OF NEVADA and UNITED STATES OF AMERICA,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

California Electric Power Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered October 14, 1952, in the above entitled case, affirming an Order of the Federal Power Commission entered April 12, 1951.

Opinions Below.

The opinion of the Federal Power Commission [R. 84] is reported at 89 PUR NS 359. The opinion of the United States Court of Appeals for the Ninth Circuit [R. 657] is reported at ..... F. 2d .....

Jurisdiction.

Judgment of the Court of Appeals was entered October 14, 1952 [R. 666]. Petition for rehearing and application for Stay of Judgment was filed October 30, 1952 [R. 667], and an Order denying the petition but staying the mandate of the Court of Appeals for a period of 40 days from the date of the Order, was entered November 12, 1952 [R. 667]. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). The cases relied on to sustain the jurisdiction of this Court are *Pennsylvania Water & Power Co. v. Federal Power Commission,* 343 U. S. 414; *Federal Power Commission v. Hope Natural Gas Company,* 320 U. S. 591; *Otis & Co. v. Securities and Exchange Commission,* 323 U. S. 624.

On the basis of a single record, made at a concurrent hearing, the Federal Power Commission and the Public Utilities Commission of California each assert exclusive jurisdiction under the Federal Power Act, 41 Stat. 1063, as amended by Title II of the Public Utility Act of 1935, 49 Stat. 838, 16 U. S. C. 791, *et seq.,* over the rates for electric energy charged by Petitioner to the United States Navy and to Mineral County Power System. The California Supreme Court has upheld the Public Utilities Commission's claim of exclusive jurisdiction and the United States Court of Appeals for the Ninth Circuit has upheld the Federal Power Commission's claim of exclusive jurisdiction. This Court has granted certiorari to review the order of the Supreme Court of California (Cases 205, 206).

The questions presented to this Court are substantial as is more fully developed under the reasons for granting the writ (*infra,* pp. 9-13.)

Questions Presented.

The ultimate questions are (1) under the Federal Power Act does the Federal Power Commission (FPC) have jurisdiction, to the exclusion of the California Public Utilities Commission (California Commission) which is also asserting sole jurisdiction, over the rates charged by California Electric Power Company for electric energy delivered by the Company at its Mill Creek Plant in Mono County, California, to Mineral County Power System) (Mineral County) and the United States Navy (Navy), each of which transmits such energy over its own lines into Mineral County, Nevada, and (2) if FPC does have exclusive jurisdiction over said rates, did it exceed its jurisdiction by ordering the Company to put into effect certain specific rates without affording Company a hearing on the reasonableness thereof.

The specific questions are:

(1) Does Part I of the Federal Power Act give the California Commission jurisdiction over the sales to Navy and Mineral County to the exclusion of FPC? Section 19 of the Act applies to the sales to Navy if such sales are not in interstate commerce. If such sales are in interstate commerce, then Section 20 applies, as it does to the sales to Mineral County.

(2) Does Part II of the Federal Power Act give FPC jurisdiction over the sales to Navy and/or Mineral County to the exclusion of the California Commission? Considering the Navy and Mineral County separately, the answer to the question depends upon (a) the nature of the sales as being in interstate commerce or not; (b) the definition of "person" in Section 3(4) and the application thereof to the facts in construing Section 201(d)

of the Act; (c) the nature of the sale as "for resale" under Section 201(d) of the Act; (d) the applicability of Section 201(f) exempting the United States and political subdivisions of a state from the provisions of Part II; and (e) the applicability of Sections 201(a) and 201(b) which preserve state jurisdiction if it existed before.

(3) If the answers to questions (1) and (2) are both yes, did Part II repeal Sections 19 and 20 of Part I?

(4) If FPC has jurisdiction over the rates to Navy and Mineral County, did it exceed its jurisdiction by ordering the filing of specific rates without a hearing as to the reasonableness thereof?

Statutes Involved.

The pertinent provisions of statutes involved are Sections 3(3), 3(4), 19, 20, and 201 of the Federal Power Act (41 Stat. 1063), as amended by Title II of the Public Utilities Act of 1935 (49 Stat. 838, 16 U. S. C. 791a *et seq.*), and Section 16, Nevada Statutes of 1925, page 55, all of which are set forth in the appendix (*infra*, App. pp. 1-6.)

Statement.

Nature of the Proceeding:

Petitioner is a corporation organized and existing under the laws of the State of Delaware, authorized to do and doing business as a public utility electric corporation in the States of California and Nevada. This proceeding was commenced by FPC to determine its jurisdiction over and to regulate the rates at which Petitioner sells and delivers electric energy at its Mill Creek Plant in Mono County, California, (a) to Navy, which transmits

such energy over its own line for use at Navy's Ammunition Depot, Hawthorne, Nevada, and (b) to Mineral County, which transmits such energy over its own line for sale to the public in said Mineral County.

Contract With Mineral County.

Mineral County owns and operates a 55 kv transmission line from Petitioner's Mill Creek Plant in Mono County, California, to the town of Hawthorne, Mineral County, Nevada, from which branch lines run to various points of said County [R. 231]. Petitioner and its predecessors have served Mineral County for many years under a series of 3-year contracts, the last being that of October 5, 1945 [R. 404], providing that, for the term of 3 years from said date, Petitioner would furnish and Mineral County would purchase all of the electric energy required by the County for resale and distribution in the State of Nevada, at rates set forth in the contract, such energy to be delivered at the Jordan (Mill Creek) plant of the Petitioner. Said contract provided that it was subject to filing with FPC and was filed as "Rate Schedule FPC No. 15."

Contract With Navy.

During the recent war, in 1943, the increased power requirements of the Naval Ammunition Depot, Hawthorne, Nevada, caused Navy to apply to Petitioner for the delivery of energy at Petitioner's Mill Creek Plant into a 55 kv transmission line to be constructed, owned and operated by Navy from Petitioner's Mill Creek Plant in California to the Depot in Nevada. Accordingly, a contract [R. 394], dated July 1, 1943, was negotiated and entered into between Petitioner and the United

States, acting by and through Navy Department, Bureau of Yards and Docks (therein called "Government") providing for the sale and delivery of electric energy at said Mill Creek Plant "for use of the Government's Naval Ammunition Depot, Hawthorne, Nevada," such contract to run during the fiscal year 1944 (June 1, 1943, to May 31, 1944), and thereafter until 60 days' notice of termination by either party to the other [R. 394]. FPC did not fix or determine or approve the rates contained in said contract in the exercise of any jurisdiction under the Act, and did not file or require Petitioner to file said contract as a rate schedule under its Rules, nor did Petitioner ever do so.

Collateral Proceedings Before California Commission.

In October, 1947, Petitioner applied to the California Commission for a general increase of rates throughout Petitioner's California system. The California Commission, on July 1, 1948, effective August 1, 1948, issued Decision No. 41798 [R. 412] authorizing general increases and, itself, prepared and attached to the Decision numerous schedules of rates to be charged by Petitioner covering all classes of service throughout the California system from and after August 1, 1948, and superseding all prior schedules and rates. Among said schedules were Schedule P-2 [R. 481] applicable to large scale, bulk or industrial power, and Schedule P-3 [R. 485] applicable to power sold for resale. Said Schedules P-2 and P-3 were the only rates prescribed by said Decision applicable to such amounts of power, uses and demands as those of Navy and Mineral County, respectively, and were somewhat higher than the rates named in the two contracts with those customers, respectively.

Termination of Contracts.

In due time, and in accordance with the mutual optional right of termination contained in said Navy contract of July 1, 1943, Petitioner, by a 60-day written notice to Navy, terminated said contract as of October 1, 1948, and, thereafter applied said Schedule P-2 (applicable to industrial power consumed by the purchaser) to Navy's purchases of energy delivered and measured at said Mill Creek Plant in California.

On October 5, 1948, said contract between Petitioner and Mineral County expired in accordance with its terms, and, thereafter, Petitioner applied said Schedule P-3 (applicable to power sold for resale) to energy delivered and metered at Petitioner's Mill Creek Plant in California.

Further Collateral Proceedings Before California Commission.

Uncertainties caused by protests of Navy and Mineral County, which claimed that Decision No. 41798 did not apply to the deliveries of energy at the Mill Creek Plant, because they were not expressly mentioned in said decision, moved Petitioner to file, on August 12, 1949, Supplementary Applications requesting California Commission to declare expressly that Schedules P-2 and P-3 applied to the purchases of Navy and Mineral County, or, if they did not, to fix rates for such service. A hearing on said Supplemental Applications was held on October 7, 1949, at which Navy and Mineral County were represented. That hearing was continued until a later date. Meanwhile some correspondence had taken place between FPC and California Commission in which it was agreed to hold a concurrent hearing by FPC on an order to show cause, and by California Commission as a resumption of the hearing on said Supplemental Applications.

Concurrent Hearing and Final Orders by FPC and California Commission.

On February 15, 1950, FPC issued an Order to Show Cause [R. 1] which resulted in a concurrent hearing in San Francisco March 20-21, 1950, before a Hearing Examiner for FPC and before Commissioner Rowell for the California Commission.

On September 5, 1950, the FPC Hearing Examiner filed his report in which he sustained the contentions of Petitioner and recommended that the case be dismissed. However, on April 13, 1951, FPC issued Opinion No. 212 [R. 84] and the order herein challenged [R. 103] which reversed the Hearing Examiner and held that Petitioner's rates and charges to Navy and Mineral County are subject to the jurisdiction of FPC. On May 4, 1951, Petitioner filed with FPC Application for Rehearing [R. 113] and Motion to Stay Order [R. 127], both of which were denied June 5, 1951 [R. 146].

On July 3, 1951, California Commission issued Decision No. 43913 on the two Supplemental Applications considered at the concurrent hearing, holding that Petitioner's rates and charges to Navy and Mineral County are subject to the jurisdiction of California Commission and that Schedules P-2 and P-3 apply to those two customers respectively. The California Commission denied timely Petitions for Rehearing filed by Navy and Mineral County.

On the identical record, FPC and the California Commission arrived at diametrically opposite decisions.

Review Proceedings.

Navy and Mineral County petitioned the Supreme Court of California for review of the California Commission decision. The orders of the California Supreme Court denying the petitions for review, 38 A. C. 323, and petitions for rehearing, 38 A. C. 484, constitute a determination upon the merits, *Napa Valley Electric Co. v. Railroad Commission,* 251 U. S. 366, and fully sustains the position of the California Commission.

On June 21, 1951, Petitioner filed with the United States Court of Appeals for the Ninth Circuit a Petition for Review of the FPC Order [R. 623] as authorized by Section 313(b) of the Federal Power Act. On October 14, 1952, the Court of Appeals entered its judgment affirming said order and sustaining the position of FPC [R. 666]. Petitioner's timely Petition for Rehearing was denied by the Court of Appeals on November 12, 1952 [R. 667].

This honorable court has granted the petitions of Navy and Mineral County for Writs of Certiorari to review the order of the Supreme Court of California upholding jurisdiction of the California Commission. The Navy and Mineral County cases have been assigned Nos. 205 and 206 respectively.

Reasons for Granting the Writ.

1. This case presents a substantial question under the Federal Power Act which has not been, but should be, settled by this Court: Does Part II of the Federal Power

Act repeal by implication Sections 19 and 20 of Part I of said Act?

Petitioner is a licensee under the Act [R. 103]. Sections 19 and 20 provide for the regulation of a licensee's rates. Section 19 provides that every licensee which is a public service corporation shall be subject to regulation by the State where the service is rendered or the rate charged, in this case, California. Section 20 provides that, if such power, or any part thereof, enters into interstate commerce, and if any of the states directly concerned have not provided a Commission to regulate the rates or such Commissions are unable to agree, then jurisdiction is conferred on the Federal Power Commission.

Under those provisions, it is immaterial whether or not interstate commerce be involved, for in neither event does FPC have jurisdiction under Part I, since the California Commission is admittedly a qualified Commission, the Nevada Public Service Commission is specifically authorized by statute to regulate the rates which Mineral County charges its customers, and there is no evidence in this case that the two Commissions are unable to agree.

Since, under the facts of this case, regulation by a state or states has been provided for, Petitioner contends that FPC may not assert jurisdiction under Part II of the Act, it being provided in Section 201(a) that federal regulation under that part is "to extend only to those matters which are not subject to regulation by the States."

The Court of Appeals thought that in view of *Pennsylvania Water & Power Co. v. Federal Power Commission,* 343 U. S. 414, it was unnecessary to determine whether state regulation was provided for under Part I [R. 660, 661], apparently assuming that Part II impliedly re-

peaied Sections 19 and 20. Neither *Pennsylvania Water & Power Co., supra,* nor *Safe Harbor Water Power Co. v. Federal Power Commission,* 179 F. 2d 179, stand for that proposition. In both of those cases, interstate commerce being indisputably involved, it was found that the State Commissions were unable to agree, thus, under the express provisions of Section 20, transferring jurisdiction to FPC. There is nothing in either case explaining what would be the consequences in the absence of the critical finding that the State Commissions were unable to agree. There we would have power to regulate conferred on both state and federal commissions, precipitating an incongruous condition.

2. The decision of the Court of Appeals in this case is probably in conflict with an applicable decision of this Court.

In *Federal Power Commission v. Idaho Power Co.,* 73 S. Ct. 85 (No. 12, October Term, 1952, decided November 10, 1952), this Court reversed a decision of the Court of Appeals for the District of Columbia which had held that a provision of Part II of Federal Power Act procluded the inclusion of a particular clause in a project license granted under Part I of the Act. This Court after saying: "Part I and Part II provide different regulatory schemes," held that Part II did not change or alter any power granted under Part I and that Part II could not be construed as a repeal by implication of the powers over licensees that were contained in Part I.

That is exactly the principle contended for by the Petitioner, California Electric Power Company, in the instant case and denied by the Court of Appeals for the 9th Circuit, which, while not expressly stating that Part II re-

pealed by implication Sections 19 and 20 of Part I, cannot be rationalized on any other basis or principle.

3. This Court has heretofore granted the petitions of Navy and Mineral County for writs of certiorari to review the order of the Supreme Court of California which upheld the jurisdiction of the California Commission over the rates involved herein (Cases 205, 206). As pointed out under our Statement of the case, this case and those two cases arose out of the same record and involve the same general questions.

If this Court denies our petition for certiorari, but determines in cases 205 and 206 that the California Commission has jurisdiction over the rates involved, Petitioner will be placed in the position of having to refuse to obey the mandate of the Court of Appeals, thereby subjecting itself to possible contempt proceedings, in order to comply with the ruling of this Court.

Petitioner has obtained a stay of the mandate of the Court of Appeals for a period of 40 days from and after November 12, 1952, in order to obtain a writ of certiorari from this Court. Unless that mandate is further stayed or a petition is granted within said period, Petitioner must comply with the order of FPC. Enforcement of said Order prior to a determination by this Court of the jurisdiction of FPC to enter the same would be unfair and inequitable and would deprive Petitioner of its property without due process of law and take property of Petitioner without just compensation, contrary to Amendment V of the Constitution of the United States, and

would result in confusion and misunderstanding if this Court thereafter upheld jurisdiction of the California Commission over the rates involved.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

December 8, 1952.

HENRY W. COIL,
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Attorneys for Petitioner.

APPENDIX.

(1) Federal Power Act, Sec. 3(3):

"'corporation' means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include 'municipalities' as hereinafter defined";

(2) Federal Power Act, Sec. 3(4):

"'person' means an individual or a corporation";

(3) Federal Power Act, Sec. 19:

"That as a condition of the license, every licensee hereunder which is a public-service corporation, or a person, association, or corporation owning or operating any project and developing, transmitting, or distributing power for sale or use in public service, shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case of the development, transmission, or distribution, or use in public service of power by any licensee hereunder or by its customer engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges

of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of such license that jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control: Provided, That the jurisdiction of the commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter."

(4) Federal Power Act, Sec. 20:

"That when said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or any subsidiary corporation, the stock of which is owned or controlled directly or indirectly by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are hereby prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State or to regulate and control the amount and character of securities to be issued by any of such parties or such States are unable to

agree through their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor, or on the amount or character of securities to be issued by any of said parties, jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce and to regulate the issuance of securities by the parties included within this section, and securities issued by the licensee subject to such regulations shall be allowed only for the bona fide purpose of financing and conducting the business of such licensee.

"The administration of the provisions of this section, so far as applicable, shall be according to the procedure and practice in fixing and regulating the rates, charges, and practices of railroad companies as provided in the Act to regulate commerce, approved February 4, 1887, as amended, and that the parties subject to such regulation shall have the same rights of hearing, defense, and review as said companies in such cases.

"In any valuation of the property of any licensee hereunder for purposes of rate making, no value shall be claimed by the licensee or allowed by the commission for any project or projects under license in excess of the value or values prescribed in section 14 hereof for the purposes of purchase by the United States, but there shall be included the cost to such

licensee of the construction of the lock or locks or other aids of navigation and all other capital expenditures required by the United States, and no value shall be claimed or allowed for the rights granted by the commission or by this Act."

(5) Federal Power Act, Sec. 201:

"(a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

"(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for

such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

"(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

"(d) The term 'sale of electric energy at wholesale' when used in this Part means a sale of electric energy to any person for resale.

"(e) The term 'public utility' when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part.

"(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of

any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto."

(6) Nevada Statutes 1925, page 55, Sec. 16:

"The maintenance and operations of said Mineral County Power System shall be under the control, supervision and authority of the board of managers and rates charged to consumers for sale and distribution of electric energy and current, and the tolls from telephone service, with the terms and conditions thereof, shall be fixed by said board, subject to supervision of the Nevada Public Service Commission, who may revise, raise or lower the same."

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 495

CALIFORNIA ELECTRIC POWER COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, COUNTY OF MINERAL, STATE OF NEVADA AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES OF AMERICA AND THE FEDERAL POWER COMMISSION

The petition for a writ of certiorari in this case seeks to bring before this Court for review the decision of the Court of Appeals for the Ninth Circuit affirming the Federal Power Commission's order which holds that it had jurisdiction over the sales of electric energy by the California Electric Power Company to the Navy Department's Ammunition Depot in Hawthorne, Nevada, and to the County of Mineral, State of Nevada.

The decision of the Ninth Circuit is one of the three court of appeals' decisions squarely in con-

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flict with the decision of the Supreme Court of the State of California in *United States* v. *Public Utilities Commission of the State of California; County of Mineral, State of Nevada* v. *Public Utilities Commission of the State of California,* pending on writs of certiorari, Nos. 205, 206, this Term. In Nos. 205 and 206, which were heard on January 14, 1953, the California Supreme Court affirmed the order of its Public Utilities Commission holding that it had exclusive jurisdiction over the Company's sales of electric energy to the Navy and Mineral County which are involved in the instant case.

While it is believed that the Ninth Circuit's decision is clearly correct (see Brief for the United States in No. 205), we do not oppose the granting of certiorari in view of the close relationship between this case and Nos. 205 and 206. We suggest, however, that the Court may deem it advisable to defer action on the instant petition for certiorari until it has disposed of Nos. 205 and 206.

Respectfully submitted.

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Solicitor General.

JANUARY 1953.

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HAROLD B. WILLEY, Clerk

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Intervenors.

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PETITION FOR REHEARING ON DENIAL OF WRIT.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR REHEARING ON DENIAL OF WRIT.

To the Honorable, the Chief Justice and Justices of the Supreme Court of the United States:

Petitioner, California Electric Power Company, hereby moves the Court for Rehearing on the order entered April 13, 1953, denying Petitioner's application for writ of certiorari to the United States Court of Appeals for the Ninth Circuit, and, as grounds therefor, states:

I.

By denying said Petition for Certiorari, this Court has left in effect decisions of the Court of Appeals and Federal Power Commission (FPC) which are inconsistent with the principles laid down by this Court upon the same state of facts in Nos. 205 and 206 (this Term), decided April 6, 1953.

Nos. 205 and 206 (treating them as one case), on the one hand, and No. 495, on the other hand, we submit, now exhibit unjustifiable conflict of judicial decision. Both arose from the same set of facts, the same administrative hearing, and the same record, though the records are different in this Court for reasons hereinafter stated.

In March, 1950, Public Utilities Commission of California (California Commission) and FPC held a concurrent hearing in which California Electric Power Company, Petitioner here, was Respondent. As the result thereof, each commission held that it had jurisdiction to fix rates for electric energy sold at Mill Creek, California, by said Power Company to United States Navy and Mineral County, Nevada, for transmission into and resale or consumption by the purchasers in Nevada.

The United States (Navy) and Mineral County applied to the Supreme Court of California for a writ of certiorari which was denied, with the effect under California law of affirming the decision of California Commission. But, because the writ was denied, no record was ever certified by the California Commission to the State Supreme Court, and, hence, the only record brought here in Nos.

205 and 206 was the opinion and decision of California Commission and some miscellaneous pleadings and briefs.

The decision and order of FPC arising out of the same hearing and facts was taken by Power Company to the Court of Appeals for the Ninth Circuit, which affirmed the order on all issues (*California Electric Power Co. v. FPC*, 199 F. 2d 206) and the Company filed its petition (No. 495) for Certiorari in this Court. This Court denied the writ April 13, 1953.

That leaves in effect a judgment and opinion of the Court of Appeals for the Ninth Circuit which is directly in conflict with the judgment and opinion of this Court in Nos. 205 and 206 in the following particulars:

The order of FPC of April 12, 1953, affirmed by the Court of Appeals in No. 495, operates *prospectively* as well as *retrospectively* and requires the Power Company to file with FPC rates *for the future* covering *all* energy delivered to Navy and Mineral County, while this Court in Nos. 205 and 206, though making some qualifications about past transactions, holds that for the future FPC has jurisdiction only over energy sold for resale, and has recognized the jurisdiction of California Commission to regulate that sold for consumption.

(2) The Court of Appeals based its decision on *Pennsylvania Water and Power Co. v. FPC*, 343 U. S. 414, and said that it "disposes of petitioner's argument."

But, in Nos. 205 and 206, this Court distinguished *Pennsylvania Water and Power Co.* and held that it did not apply to the facts of those cases.

(3) The Court of Appeals adopted the contention of FPC to the effect that it was impractical to separate the jurisdictional from the "alleged" non-jurisdictional energy and held it to be clear that the only mode of segregation would be by supplying each of the two loads by an independent transmission line from Mill Creek, California, to the Ammunition Depot in Nevada.[1] The Court of Appeals backed up that proposition with the declaration of a new, general principle of law to the effect that, in all sales to a public body (it was not explained why it would not equally apply to a private body engaged in resale), some part of the energy is used by the purchaser for its own purposes, and it would create untold difficulty and confusion if petitioner's argument in respect of severability for rate regulation were to be given countenance.[2]

In Nos. 205 and 206, this Court held in effect that segregation was not impossible; that whether it had been accomplished or could be accomplished did not appear from the record (partial) in those cases; and that Cali-

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[1]That was based on the fantastic contention that such was necessary to keep separated the precise kilowatt hours, molecules, atoms, or particles of electricity! It ignored evidence in the record [Exhibits 22 and 32] showing actual meterings of energy resold for the entire period up to the hearing. But, if the proposition were true, Power Company must have the right to require the Navy to build and operate the two lines separately, for it certainly cannot be law that the customer may so transmit, transform, mingle, handle, or use electric energy or any other commodity so as to defeat the right of the selling utility to measure it for the purpose of applying the proper rate under applicable law.

[2]Under this sweeping declaration of law, segregation could never be accomplished, if for no other reason, because it would be too much trouble! More amazing is the obvious fact (overlooked by the Court of Appeals) that, even if two lines were built, then, unless their use is controlled by Power Company, part of the energy from each line could be resold and part consumed, thus, reverting to exactly the same supposed inextricable commingling as existed with one line.

fornia Commission should have the opportunity to consider the problem and perfect the record. This Court further cited *Colorado Interstate Gas Co. v. FPC*, 185 F. 2d 357 (3rd Cir.), and *City of Hastings v. Kansas-Nebraska Natural Gas Co.*, FPC Opinion No. 244, Feb. 5, 1953, as indicating that the views of FPC might still be in the formative stage. From the latter opinion, it appears that Mr. Chairman Buchanan, in dissenting, relied strongly on the very decision involved in No. 495, that is, *California Electric Power Co. v. FPC (supra)*, but the four-member majority, though mentioning that case, declined to follow it, but held that gas sold to the City of Hastings through a single gate or pipe partly for resale and partly for consumption, could be segregated so as to permit regulation of one part by one commission and the other part by the other commission, citing *Colorado Interstate Gas Co. v. FPC (supra)*.

There is no reason why the Court of Appeals for the Ninth Circuit should have been so overwhelmed by the simple problem of segregation, especially, when the record in that case (No. 495) contained Exhibit 32 (introduced by the United States) showing energy resold by years for the period 1943-1948 and Exhibit 22 showing it by months for the year 1949 and January and February, 1950, that is, practically up to the date of the concurrent FPC and California Commission hearing.

The solution is simply this: a quantity of energy is sold by Power Company to Navy at Mill Creek, California, which is transmitted by Navy to the Ammunition Depot where part is resold to its tenants and the rest is consumed by the Navy in the operation of machinery and line and transformer losses. The amount of energy resold by Navy is known, because it has to be metered to be resold

[Exhibits 22 and 32], and the amount delivered by Power Company to the Navy at Mill Creek is also known, for it is likewise metered. Hence, by substracting the total amount resold by Navy each month from the total amount delivered to Navy by Power Company during that month, a difference is reached which is the amount consumed by the Navy. By ignoring the small amount of energy generated from time to time by Navy in testing its emergency stand-by engines, the amount of energy purchased from Power Company and resold by Navy is slightly overstated, which, of course, is to the advantage of FPC and of which it cannot complain. But, even with that concession, the resale component remains the smaller part of Power Company's business with Navy. That business is predominantly sale for consumption, and the effort to make it all for resale is unjustifiable.

II.

Certiorari should be granted for the usual and generally accepted reason that the decision of the Ninth Circuit in *California Electric Power Co. (supra)* conflicts with the decision of the Third Circuit in *Colorado Interstate Gas Co. (supra)*.

Wherefore, Petitioner submits that writ of certiorari should issue, at least, as to the last three paragraphs of the opinion in *California Electric Power Co. (supra)*, so as to permit this Court to conform the same to Part III of the opinion of this Court in Nos. 205 and 206.

Respectfully submitted,

HENRY W. COIL,
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Attorneys for Petitioner.

Certificate.

Undersigned counsel in the above entitled case hereby certifies that the within Petition for Rehearing is presented in good faith and not for delay, and that said Petition is restricted to the grounds specified in Rule 33 of this Court. Dated April 24, 1953.

HENRY W. COIL,

Attorney for Petitioner.